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TO: State Board of Education

FROM Tom Watkins

SUBJECT: Federal Update

**FULL SENATE CONSIDERATION OF IDEA REAUTHORIZATION NOW IFFY**

Time and challenges by parent advocates, disability groups, and a state-based organization are now impacting more heavily on whether the full Senate in the weeks ahead will take up S. 1248, the reauthorization of the Individuals with Disabilities Education Act. First, the Senate has limited time available to grapple with what could be contentious debate over the omnibus education law governing education programs for special needs children, despite last fall's unusual unanimous consent agreement limiting floor amendments during the bill's consideration. Congress needs to complete the budget process, which typically is time consuming and this year presents unique challenges with the funding of the war in Iraq, unusually tight spending constraints, a growing schism between the executive and legislative branches, and election year politics.

Washington-based national associations were weighing in on IDEA's Senate floor fate, with the National Association of State Boards of Education asking states to contact their senators to ask for a vote, and the National Conference of State Legislatures (NCSL) and the National Association of Developmental Disability Councils forthrightly coming out in opposition.

Since the Senate Health, Education, Labor and Pensions Committee reported the bill last fall and the Senate adopted the agreement limiting topics of debate, the apparent momentum against the bill has steadily grown. At first, it was lead mostly by parent advocate groups and individuals primarily concerned about the student discipline changes in the legislation, and the belief that the committee's deliberations limited input. More recently, NCSL on April 7 issued their thumbs down position in a letter to Senators. The organization's primary concerns are the expansion of unfunded mandates, the pre-emption of state authority by "assigning punitive and arbitrary enforcement powers to the U.S. Secretary of Education", the funding of protection and advocacy agencies to provide legal aid to parents, and lack of clarification for the application of the "highly qualified teacher" provisions of the No Child Left Behind Act.

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Last summer NCSL joined with other state-based groups, namely NASBE, the National Governors Association, the Council of Chief State School Officers (CCSSO), and the National Association of State Directors of Special Education, to offer ten proposed changes to S. 1248.

CCSSO opted at their annual meeting in November 2003 to appoint a Task Force on Special Education to fine-tune their position. Their five-page IDEA Recommendations, issued this week (Attachment A), applauded the Senate Committee's "admirable objectives" of preserving student and parent rights, shifting from procedural compliance to a culture of learning and student outcomes, providing adequate funding for the demands of the law, decreasing paperwork, and decreasing the misidentification of children.

However, CCSSO pointed out that the bill's language "does not recognize the realities of the current state and local capabilities." In particular, the task force cited required resources, complexity of special education needs and services, shortages of personnel, amount of needed professional development, lack of research and models, lack of state (or federal agency) sharing of responsibilities or costs – interagency mandates, costs of complaints and litigation, loss of current teachers deterred by paperwork and procedures, and the use of monitoring and labelling to force state compliance.

"The members of CCSSO believe strongly in providing a free appropriate education for *all* students. The reauthorization process should be guided by an overarching mission of improving services to and learning results for students in the classroom," the report stated.

Another critical factor in the bill's consideration is the now perennial Hagel-Harken amendment, mandating full funding of 40 percent of the costs of IDEA. The closer a vote is taken to elections the higher the potential it has of garnering more Senate votes, even though the likelihood of such an amendment surviving a conference committee with the House is remote or negligible. Senate Majority Leader Bill Frist (R-Tennessee) is reportedly disinclined to want to put his chamber through that drill one more time. In 2000, prior to the last presidential election, the Senate voted 100-0 to support Hagel-Harken as an amendment to NCLB. Individuals close to those negotiations believe it failed on a tally of the House conferees by only one vote. (Conference committee decisions must have a majority of both the Senate and House members serving to pass.)

As this report was being written, despite the Easter Recess, the buzz around IDEA in Washington is intensifying, and the fate of IDEA in Senate hands has become increasingly unpredictable.

## **HOUSE PASSES CHILD NUTRITION IMPROVEMENT AND INTEGRITY ACT**

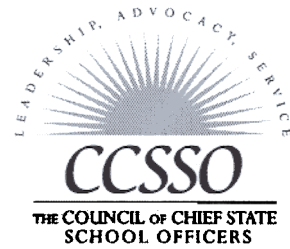
In a strong bipartisan move on March 24, the House passed, 419-5, the Child Nutrition Improvement and Integrity Act. Earlier the House Committee on Education and the Workforce reported the bill on March 10 in a unanimous 42-0 vote.

Direct certification of program participants, whereby if a child or family qualifies for Temporary Assistance for Needy Families or WIC (Special Supplemental Nutrition Program for Women, Infants and Children), a child automatically qualifies for school lunch and/or breakfast is intended to cut back on paperwork in child nutrition programs authorized under this act. Parents also would be permitted to submit a single application for multiple children. Under the bill, school lunch certifications would be valid for one full year, preventing situations in which schools are forced to repeatedly certify children within a single school year.

Provisions were added to protect students' financial status and to enhance technological capability in the program, so that more students may participate.

Michigan Congressman Fred Upton (R-St. Joseph) and Congressman Ron Kind (D-Wisconsin) were successful in sponsoring an amendment to extend a pilot project in which Michigan participated that permits local school districts to purchase more local fresh fruits and vegetables.

Senate action is expected soon.



## **CCSSO IDEA RECOMMENDATIONS**

**Produced by the CCSSO Task Force on Special Education**

Congress is currently considering legislation to reauthorize the Individuals with Disabilities Education Act (IDEA). In 2003, the U.S. House of Representatives passed a reform package, H.R. 1350, with bipartisan support. The Senate is expected to consider its own proposal, S. 1248, on the Senate floor in early April 2004. While there are positive reforms in both bills, there are a number of issues that must be addressed to ensure that the reauthorization serves the best interests of students with disabilities. The goal of IDEA must be to fully support states in ensuring “that educators and parents have the necessary tools to improve educational results for children with disabilities.” The following document outlines issues identified by CCSSO’s Task Force on Special Education and suggests possible recommendations.

The Reauthorization of IDEA draws on some 25 years of Federal legislation designed to provide children with disabilities the services needed to provide them with a free appropriate public education. The following issues are drawn largely from the Senate bill, although a number of the issues are also found in House bill H.R. 1350. The list is not meant to be comprehensive, but rather it reflects the concerns and issues raised by a number of states-based organizations as well as CCSSO. The Council will continue to work with Senators and their staff in an effort to improve S. 1248, with the ultimate goal of reauthorizing IDEA in a manner that improves academic opportunities and results for all kids.

### **Stated Purposes**

The Senate bill appears to be guided by several admirable objectives, including:

- Preserving student and parent rights
- Shifting from procedural compliance to a culture of learning and student outcomes
- Providing adequate funding for the demands of the law
- Decreasing paperwork
- Decreasing the misidentification of children.

CCSSO supports the Senate objectives, however, the legislative language does not recognize the realities of the current State and local capabilities with respect to:

- Required resources
- Complexity of special education needs and services
- Shortages of personnel
- Amount of needed professional development
- Lack of research and models
- Lack of state (or federal agency) sharing of responsibilities or costs – interagency mandates
- Costs of complaints and litigation

March 23, 2004

- o Loss of current teachers deterred by paperwork and procedures
- o The use of monitoring and labeling to force state compliance

The members of CCSSO believe strongly in providing a free appropriate education for *all* students. The reauthorization process should be guided by an overarching mission of improving services to and learning results for students in the classroom. In particular, the Task Force has identified the following recommendations to improve the current proposal for reauthorization pending in the Senate:

**Improve the Definition of “Highly Qualified” Personnel to Ensure Special Education Programs Have Teachers and Paraprofessionals who are Qualified Based on Job Requirements and Responsibilities**

One of the most important issues in the reauthorization of IDEA is to ensure that students with disabilities, regardless of their instructional setting, have teachers and paraprofessionals who are highly qualified to support their Individual Education Program. Unfortunately, the No Child Left Behind Act’s definition of “highly qualified” is not appropriate to the unique skills required of special education teachers. Experience in core content areas alone does not qualify a teacher to meet the diverse needs of students served in special education or the complexity of individualized learning environments.

The adoption of NCLB standards for special education teachers has not been adequately resolved in either the House or Senate IDEA reauthorization bills. H.R. 1350 incorporates the definition of highly qualified from NCLB, but fails to acknowledge the different environments in which special education teachers work. S. 1248 acknowledges the different environments, but goes on to require that special education teachers must be certified not only in special education, but also in each academic area that they teach.

Neither bill recognizes the following:

- o The shortage of special education teachers
- o The movement of special education teachers to other assignments as a result of excessive paperwork and threat of complaints
- o The disconnect between K-12 and higher education systems
- o Lack of research effectiveness on special education teachers education

We are concerned that requiring special education teachers be held to *both* standards – those in the No Child Left Behind Act *as well as* those in the IDEA—will deter teachers from the field and exacerbate personnel shortages. In addition, we believe the requirements are frequently inappropriate for the job responsibilities and requirements of many special education teachers.

For special educators, we suggest that “highly qualified” be defined to incorporate the concept of *access* to teachers with expertise in the core content areas. For special education teachers, access would be defined to mean oversight or team teaching (as appropriate) with a teacher deemed highly qualified in the core content area(s).

The special education teaching certificate demonstrates specialized training and qualifications for teaching students with disabilities. Therefore, teachers serving students functioning significantly below grade level should be deemed “highly qualified” based on successful certification. Although the Senate attempted to address this problem, their bill requires an elementary certification for these teachers. The elementary certification is not an appropriate additional requirement. Without creating reasonable and attainable expectations for teacher qualifications we will experience a major crisis in teachers exiting the special education profession.

**Provide Adequate Funding and Time for States to Meet New Data Collection Requirements and Allow Adequate Time to Phase in These Requirements**

S. 1248 contains numerous data collection and analysis requirements, yet, as noted below, the state set-aside is capped, leaving no new money for data collection or analysis. A second equally significant problem is that the electronic data systems to collect this information using a relational database (which enables longitudinal analyses) are not in place. For example, Section 611 (e) (3), which addresses the establishment of risk pools, requires states to ensure that risk pool funds are not used to pay for covered Medicaid expenses. States do not currently collect that information. Under Section 618, there are 14 distinct data sets to be collected as well as “any other information that may be required by the Secretary.” Under Section 618, States will now be required to collect data on all students with disabilities as well as other information related to disciplinary actions. In addition to these 14 data sets, states will also be required to provide information on disproportionality. This does not appear to include socioeconomic status, which has commonly been a major source of disproportionality. The costs of providing all this data should not be required until funds are provided. At the same time, the U.S. Department of should fund a grant to create a common template/format for the collection.

**Modify the Language in Section 616 on Monitoring and Enforcement Because it is Unnecessarily Punitive and Arbitrary.**

Section 616 requires the Secretary of Education to determine whether a State shows “significant lack of progress” or it is in “substantial noncompliance” or “egregious non compliance.” These terms are not defined in the bill, leaving the states uncertain as to what is required to be in compliance. The bill does not provide any hearing process for states, nor does it allow the Secretary to provide for no-fault demonstrations of effort. The punishments are extreme, leaving States with no due process except Federal litigation. Most states cannot afford the costs of such judicial review.

Section 616 needs to be rewritten to focus compliance on the achievement of outcomes through the development of a realistic remedial plan, the provision of technical assistance and an implementation overseen by the Department of Education that is based upon data directly related to child performance outcomes within the state. Labeling states and asking the Department of Justice to sue them will not guarantee good outcomes for students with disabilities. This will only tie up energy and time of dedicated state personnel, while diverting state funds and efforts away from focusing on outcomes for students. This section should also remove the remedy of recovery of funds back to 1990.

**Eliminate Section 611 (e) (2) (B) (iii) that Requires States to Fund Protection and Advocacy Agencies to Provide Legal Assistance to Parents, Including the Filing of Lawsuits Against State and Local Education Agencies.**

S. 1248 calls for the establishment of a fund for the Protection and Advocacy Agency, which will provide legal assistance to parents. It is an inherent conflict of interest for states to fund protection and advocacy services to sue the state. In every other area of law, it would be a conflict of interest for an attorney to be paid by an entity that could potentially be the object of a lawsuit file by that lawyer. The goals of parent involvement are to educate them about the rights and the progress of their child, to use due process, mediation and arbitration services, and to foster the best relationships possible without resorting to expensive litigation. There are also other resources available for protection and advocacy services.

**Eliminate Section 604, Abrogation of State Sovereign Immunity**

During the 1997 reauthorization of IDEA, Congress preempted the Constitutional guarantee (11<sup>th</sup> Amendment) of state sovereign immunity. Section 604 of the IDEA establishes that states shall not be immune to suit in federal court for violations of the IDEA. Although Section 604 has been in law since 1997, the new monitoring and enforcement requirements, the elimination of a hearing process and the requirement to fund Protection and Advocacy Agencies combine to create the possibility of endless litigation against the states in federal courts.

For example, a state could be labeled by the Secretary of Education as “egregiously non-compliant,” based on unclear criteria, and without the ability to appeal the decision. The state would then be required to fund Protection and Advocacy efforts to sue the state for non-compliance, and the only venue would be the federal courts. This would establish a mandated conflict of interest for the states. Claims under IDEA are best settled in state courts, which are closer to the issues being litigated and which are in a much better position to provide oversight of their judicial decisions. The end result of these provisions will be to divert state resources away from technical assistance and direct services to help teachers and students in the classroom.

**Reduce Excessive Paperwork**

A pervasive problem for special education personnel is the effort required to provide a paper trail of notices, permissions, description of services, eligibility determination, and student IEPs. It is heartening to see the inclusion of a requirement for the U.S. Department of Education to develop a common IEP form and the House proposal for a pilot project for 10 states to reduce paperwork. These are encouraging, but the new regulation requirements increase the data collection, which will in turn continue to expand paperwork at the classroom, district and state levels. This paperwork burden on teachers will continue to decrease quality instructional time and thus hurt the very students these requirements are intended to benefit.

**Simplify Discipline Procedures**

School personnel continue to be frustrated about the complexity of discipline provisions for special education students and they complain that students cannot be disciplined. The process of disciplining students with disabilities must be simplified and schools provided flexibility in its implementation. Students should not be denied access to educational services, but strategies are needed for handling disciplinary problems in which the double standard could be avoided.

**Strengthen the Provisions for Interagency Collaboration**

Although S. 1248 calls for a coordinated, multidisciplinary, statewide interagency system to provide services for children with disabilities, the responsibility for funding falls on the local schools. Special education services require related health, rehabilitation, social service, mental health, and corrections services. Yet these agencies are seldom involved in providing or supporting the services. The requirement for interagency collaboration should be strengthened to ensure that other public agencies provide and pay for appropriate services needed by children with disabilities.

**Make “Risk Pools” Optional**

The Senate bill requires each state to create a statewide “risk pool” to help districts absorb the costs of students with low-incidence, high-cost disabilities. The ability to use federal funds for this purpose is already in current law, and approximately half of the states have created programs to meet this need. We applaud the House bill for continuing to allow states this option. However, the Senate bill mandates that all states must create a risk pool, and the proposal specifies a particular formula that all states must use to determine eligibility. A mandatory risk pool would create problems for many states. In the case of small states, most do not have the State Education Agency capacity to administer the program, and administrative funds are not provided. On the opposite end of the spectrum, large states anticipate the program will be extremely costly because the formula stipulated in the Senate bill is too prescriptive and would make too many students eligible for the funds. Additionally, having a fixed funding level at which students would become eligible for the state funds would create an incentive for schools and districts to increase costs. For example, an LEA may have the option of educating a deaf student for \$30,000 a year or placing the child in a school for the deaf at a much higher cost. It may be tempting for an LEA to place the child in a school for the deaf, knowing the child will become eligible for the risk pool and the state will pay for the tuition, even if that placement is not in the best interest of the child. We cannot allow these funds to interfere with placement decisions for students with disabilities. Research from the Center for Special Education Finance suggest that funding models be based on programmatic principles and student results, not on the overall price for educating the student. We recommend that the risk pools be optional for all states. Additionally, states should be given full discretion to determine which students will be eligible for the program.

**Provide Adequate Funding for the Realities and Concerns**

Federal funding currently falls well short of the promised 40% of costs. Congress is currently funding the program at less than half the promised amount, and just 10 percent of the aggregate cost of special education. Additional IDEA funding is especially important this year in light of recent change in Medicaid funding. The policies of the Administrative Claiming Guide from the Centers for Medicare and Medicaid (CMS) eliminates millions of dollars in federal funds to state and local school systems for the skilled medical personnel who work in schools. We appreciate recent efforts to increase IDEA expenditures, and we recommend that Congress continue to pursue full funding for special education.

The Senate and House versions also place a cap on the state administrative set aside in Section 611. The Senate bill freezes the set-aside at the 1997 level (with minimal adjustments for



March 23, 2004

inflation) with the exception of small states, would receive \$800,000. A cap is also placed on the state activities set-aside through FY 2005, after which time it will remain at FY 05 levels.

This is especially troubling in that the states will be required to take on significant new levels of activities, including:

- Substantial New Data systems
- Risk Pools
- Professional Development Systems – Teachers, Paraprofessionals and other personnel
- Focused Monitoring and Technical Assistance
- Alternative Assessments
- Early Interventions

We recommend that the state set asides be increased to reflect the additional activities expected of them in the new reauthorization.

Lastly, as the Federal government continues to increase its share of special education funding, states and school districts need relief from maintenance of effort requirements. In the absence of federal contributions, states and local schools have absorbed the additional costs. As the federal funds increase and the fiscal burden is redistributed, states and schools should be able to reduce their expenditures, so long as the requirements of IDEA are being met.

**As representatives of the state education agencies implementing IDEA, we ask for your serious consideration of these recommendations. We believe our suggestions will more fully realize your stated objective of ensuring “that educators and parents have the necessary tools to improve educational results for children with disabilities.”**